like the *Meyer Drug Co.* case may soon be presented to the Supreme Court, so that its view on that particular phase of the question may be expressed instead of inferred. E. H.

WHEN IS A TELEPHONE COMPANY A PUBLIC UTILITY?—Defendant company, organized under and pursuant to the corporation laws of the state of Illinois, was about to commence operations directed to the establishment and construction of a telephone line which was "to be for the private use of the members of the association only, for the purpose of telephonic communication between them, for their private and community interests and not for the pecuniary profit of any person or persons connected with said association, and not for the profit of any stockholder interested as owner of any interest in said corporation," when plaintiff, a public utility telephone company whose lines extended over the same territory which the defendant intended to occupy, filed a petition requesting the State Public Utilities Commission to restrain defendant from proceeding further with its operations, because it had failed to obtain from the commission a certificate of convenience and necessity provided for by § 55 of the act entitled "An act to provide for the regulation of public utilities." Laws of 1913, p. 460. That section reads as follows: "No public utility shall begin the construction of any new plant, equipment, property or facility * * *unless and until it shall have obtained from the commission a certificate that public convenience and necessity require such construction." *Held,* that defendant company did not contemplate the carrying on of a public business and was therefore not amenable to the rules and regulations which it was the duty of the Commission to enforce. *State Public Utilities Commission ex rel. Macon County Telephone Co.* v. *Bethany Mutual Telephone Ass'n,* 270 Ill. 183, 110 N. E. 334.

This case was decided by the Supreme Court of Illinois on Oct. 27th, 1915; but the court did not mention a contrary decision rendered by the Supreme Court of Ohio on July 2nd, 1915. (WANAMAKER, J., dissenting.) The Ohio case was the outgrowth of two suits, similar in every detail of their facts to the facts in the principal case. One suit was instituted by *The New Ashley Telephone Co.* and sought to restrain *The Ashley Tri-County Mutual Telephone Co.* from constructing and operating its line in Delaware County; the other suit, which arose in Morrow County, was instituted by *The Morrow County Telephone Co.* against *The Farmers' Mutual Telephone Co.* The plaintiffs in these cases were defeated in the county courts but on appeal their contentions were sustained. The cases are not officially reported as yet, but they appear on the Ohio Supreme Court docket as Nos. 14, 652 and 14, 766 respectively.

It is a fundamental and elementary rule that the character and purpose of an incorporated institution are to be gathered solely from its charter. *Succession of Nicholson,* 39 La. Ann. 346; *Dartmouth College* v. *Woodward,* 17 U. S. (4 Wheat.) 518, 4 L. Ed. 629; *Soc. for the Propogation of the Gospel* v. *Town of New Haven,* 21 U. S. (8 Wheat.) 464, 5 L. Ed. 662; *State Bank of Ohio* v. *Knoop,* 57 U. S. (16 How.) 369, 14 L. Ed. 977; *Bardstown & L. R. Co.* v. *Metcalf,* 61 Ky. (4 Metc.) 199, 81 Am. Dec. 541; *Detroit Driving Club*

v. *Fitzgerald,* 109 Mich. 670, 67 N. W. 899; *Amer. Matinee Ass'n* v. *Sec'y of St.,* 140 Mich. 579, 104 N. W. 141, 21 Det. Leg. News 262. Hence, we need only examine the charters of the companies which were defendants in the three suits under discussion in order to ascertain whether they were conducting a public utility enterprise. Manifestly they were not. While the legislatures undoubtedly had the power to grant to them the privilege of placing poles and wires along the public highway, they did not grant to them, and had no power and no intention to grant to them the right to take property by eminent domain. *Corrigan* v. *Coney Isl. Jockey Club,* 22 N. Y. Supp. 394, 2 Misc. 512; *Board of Directors for Leveeing Wabash River* v. *Houston,* 71 Ill. 318; *Thom* v. *Georgia Mfg. & Publ. Service Co.,* 128 Ga. 157, 57 S. E. 75; *In re Eureka Basin Warch. & Mfg. Co.,* 96 N. Y. 42; MORAWETZ, PRIV. CORP., § 1114. Furthermore, no court would deny that these corporations had an absolute right to mortgage their entire property including their franchises. *Evans* v. *Boston Heating Co. et al.,* 157 Mass 37, 31 N. E. 698; *Com.* v. *Smith,* 10 Allen (Mass.) 455; *Treadwell* v. *Salisbury Mfg. Co.,* 7 Gray (Mass.) 393. Ordinarily telephone companies are quasi-public in nature, but the mere fact that a company is a "telephone company" does not necessarily make it quasi-public; the courts look to the charter, not to the name, to ascertain the real character of the corporation. *Internat. Boom Co.* v. *Rainy Lake River Boom Corp.,* 97 Minn. 513, 107 N. W. 735.

These companies, being, as they are, duly organized corporate entitities, but, as such, neither public nor quasi-public, are certainly not "public utilities." The position of the Illinois court on this point is incontrovertible. The Ohio court, on the other hand, has so interpretated the statutes of that state applicable to the case as to leave entirely out of consideration any question as to the exact character of the defendant companies. Although this Ohio decision may be said to be in strict accord with the letter of the Ohio statutes, it seems that it is not in accord with the spirit of those statutes and the intention of the legislature that enacted them.

§ 614-2 of the General Code of Ohio provides that: "Any person, or persons, firm or firms, co-partnership or voluntary association, company or corporation, wherever organized or incorporated: * * * When engaged in the business of transmitting *to, from, through or in this state,* telephonic messages, is a *telephone company* and as such is declared to be a *common carrier.*"

§ 614-8 provides: "That the commission shall have general supervision over all public utilities within its jurisdiction," etc.

§ 614-52 provides that: "No *telephone company* shall exercise any permit, right, license or franchise * * * that may hereafter be granted to own or operate a plant for the *furnishing of any telephone service* thereunder in any municipality or locality where there is in operation a telephone company furnishing adequate service, unless such telephone company secures from the commissioners a certificate after a public hearing of all parties interested that the exercise of such license, permit, right or franchise is proper and necessary for the *public* convenience."

A careful examination of the section of the Illinois statute as set out in the first paragraph above and § 614-52, General Code of Ohio, as set out in

the last preceding paragraph, reveals the reason why the two courts arrive at opposite conclusions. It will be noticed that the Illinois court had simply to determine that the defendant company was not a "public utility," and hence not within the prohibition of the statute. The Ohio court, on the other hand, simply decided that since the defendant company was a "telephone company" it fell directly within the prohibition of the statute—§ 614-52. Here it seems that the Ohio court fell into error. It construed § 614-52 separately and alone without attempting to consider it in connection with § 614-2 and § 614-8. Furthermore, the court did not subject § 614-52 to a very scrutinous examination.

In § 614-2 the legislature defined a telephone company in unmistakable terms. It will be noticed that the words used are "engaged in the business of transmitting to, from, through or in this state, telephonic messages." The words "to, from, through" manifestly do not apply to such a company as defendants; they were included solely with reference to interstate companies, that is, public service companies, doing business on a large scale and for profit. But what do the words "in this state" mean? Were they intended to comprehend all telephone companies operating within the state, whether public utilities or merely private telephone lines? Used, as they are, in connection with the words "to, from, through," it seems that it must be conceded that the legislature did not have in mind private, rural telephone systems not operated for profit but solely for the mutual benefit of the members of the corporation.

But it is unnecessary to rely upon any mere conjectures or speculations as to the intent of the legislature, for the last clause of § 614-2 proves conclusively that they did not have in mind companies like the defendants in these cases. That clause declares that telephone companies shall be common carriers. "Common carriers are those whose business, occupation or regular calling," says BOUVIER, "it is to carry chattels for all persons who may choose to employ and remunerate them." At common law telegraph and telephone companies were not common carriers, hence this action on the part of the legislature. *Amer. Rapid Telegraph Co.* v. *Conn. Telegraph Co.*, 49 Conn. 352; *Breese & Mumford* v. *U. S. Telegraph Co.*, 45 Barb. (N. Y.) 274; *Leonard* v. *N. Y. etc. Tel. Co.*, 41 N. Y. 544; *Tyler, Ullman & Co.* v. *Western Union Tel. Co.*, 60 Ill. 421. The telephone companies which the legislatures intended to make common carriers were such companies as come within the purview of definitions like that given by BOUVIER. It would be grossly unjust and illogical to say that the legislature meant to use the term "common carrier" in any other than its ordinary signification. It would indeed be difficult, if not utterly impossible, to discover one instance in all the statute books of the Union where a legislature tries to stamp upon a private corporation which does not operate for profit, and which does not purport to be a public servant in any sense of the word, the character of a common carrier. On the whole, it seems that the legislature of Ohio was acting solely with reference to those public service telephone companies which hold themselves out to accommodate the public on condition that they be paid a certain fixed compensation.

If the legislature had in mind "public service" or "public utility" telephone companies when it was defining the term "telephone companies" in § 614-2, we

must assume that they had in mind telephone companies answering the same description when they started § 614-52 with the words "No telephone company shall exercise any permit," etc. It would be absurd to contend that the legislature departed from or had any intention of departing from their own definition of specific terms, unless, of course, it expressly or impliedly appears from the context of the subsequent statute that such was their intention. § 614-52 does not, however, show any such intention. It contains words which indicate that the legislature was still speaking of "telephone companies" as defined in § 614-2. For instance, we find in § 614-52 the words "to own or operate a plant for the furnishing of any telephonic service." Manifestly, these words were used with reference solely to such "telephone companies" as the legislature had transformed into common carriers, that is, "telephone companies operating a plant for the furnishing of telephonic service" to the public. Service to the people in general, not service to the members of a merely private corporation, was unquestionably what the legislature had in mind. Again, we find the words "unless * * * the exercise of such license, permit, right, or franchise, is proper and necessary for the public convenience." It would seem that the use of the words "public convenience" is quite significant, for it must be conceded that "public utility" telephone companies, and not mere private telephone companies, are the ones that cater to the public convenience. The legislature simply meant to protect public service telephone "companies, persons, firms, co-partnerships, associations," etc., which are purely quasi-public in character and which are furnishing the public "with adequate services" from unreasonable and unnecessary interference on the part of similar companies, persons, firms, co-partnerships, associations, etc., desirous of engaging in the same kind of business.

An interpretation of statutes such as is expounded in the two Ohio cases under discussion would lead to grave results. It would mean that the legislature of Illinois, for instance, could pass an act forbidding the farmers of that state, or any number of them, from constructing and operating in the city of Chicago a warehouse for the storage of their products, even though the sole object of the farmers was to protect themselves against the high rates exacted by the quasi-public warehouses located in that city, and even though the warehouse was not open to the public and was not operated for profit. Why should the farmers be forced to consult the Public Utilities Commission and the powerful interests engaged in the warehouse business as to the "necessity and convenience" of their proposed undertaking? It seems only just and proper that they should be allowed to judge for themselves whether conditions are such that it is to their advantage to make a bona fide attempt to put their own products on the market. To hold otherwise would seem to be lending sanction to a statute which clearly deprived people of property without due process of law.

On the whole, it seems that the purpose of the statute enacted by the legislature of Ohio was, as the court in the principal case says, "to bring under control by the public, for the common good, property applied to a public use in which the public have an interest." It seems that the court ought to

have gone further than to decide that since the defendants were "telephone companies" they automatically, as it were, fell within the prohibition of the statute. M. McL.

ADMISSIBILITY IN EVIDENCE OF A PLEA OF GUILTY AFTER ITS WITHDRAWAL. —In a recent decision, (*State* v. *Carta,* 96 Atl. 411) the Supreme Court of Errors of Connecticut has held that a plea of guilty is admissible in evidence after its withdrawal. The trial court permitted the state in the presentation of its case in chief to introduce in evidence the record of the superior court showing that the accused had pleaded guilty to the same information on which he was being tried, and that subsequently, by leave of the court, he had withdrawn that plea and entered a plea of not guilty. To this the accused objected because the former plea had been entered through a misunderstanding between him and the state's attorney and because it was immaterial and injurious to his rights. The upper court held—two justices dissenting—that this was not error and that the fact that a plea of guilty had originally been entered by the accused could be shown as being inconsistent with his later claim of innocence and should be treated as an extrajudicial confession or admission.

Regarding this holding in the light of the few cases in which the question has been presented for the decision of a court, there would seem to be no sound basis for the charge made in the minority opinion that it is "contrary to the law." In the case of *State* v. *Meyers,* 99 Mo. 107, 12 S. W. 516, the defendant pleaded guilty, but this plea the court refused to receive and it was not entered of record. At the trial, the prosecution was permitted, over the objection of the defendant's counsel, to introduce the deputy clerk and others to prove these facts. This was held to be error, but the upper court, in the course of its opinion, said, "Such testimony should not have been admitted. The confession being what is termed 'a plenary judicial confession,' that is, a confession made before a tribunal competent to try him, was sufficient whereon to found a conviction. * * * No one would contend that, if the plea of guilty had been entered of record, such plea could have been received in evidence against the defendant, and yet the same principle is involved whether the plea actually go upon record or not; in either case, it must, if received in evidence, be *conclusive* of the defendant's guilt. * * *By refusing the plea and granting the defendant a trial, this of necessity meant *a trial* with the issues of fact to be determined by the jury, and not to be determined by the previous plea of the defendant, which admitted all that the state desired to prove." Clearly, the court treats the evidence which was received as a judicial confession with its conclusive effect.

In *People* v. *Ryan,* 82 Cal. 617, 23 Pac. 121, the people were allowed, over the defendant's objection, to introduce in evidence his plea of guilty in the same cause before the same court, after by permission of the court his plea of guilty had been withdrawn according to the provision of the penal code. This was held to be error. The court said, "The case stands thus, without the evidence of a withdrawn plea of guilty, for which, by authority of law and the court, a plea of not guilty was 'substituted,' the defendant could not